



TC06572

Appeal number: TC/2018/01570

*INCOME TAX – failure to file – withdrawal denied Section 8B TMA –
penalties – reasonable excuse – reliance on accountant - appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WARREN PEARSON

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: JOHN WILSON**

**Sitting in public at Manorview House, Kingsmanor, Newcastle-upon-Tyne on
Thursday 21 June 2018**

The Appellant in person

Mr C Butler, Officer, of HMRC, for the Respondents

DECISION

Introduction

1. This is an appeal against the respondents' ("HMRC") decisions to charge
5 Mr Pearson penalties totalling £2,600 under Schedule 55 Finance Act 2009
("Schedule 55") for the late submission of his individual tax returns for the tax years
2013/14 and 2014/15.

Background

2. Mr Pearson registered for self-assessment on 21 February 2017 stating that he
10 became a company director from 20 March 2013. HMRC issued Notices to File tax
returns for each of the tax years 2013/14 and 2014/15 on 21 February 2017.

3. The return due date was specified on each Notice to File as 31 May 2017. As at
17 May 2018, no returns had been filed.

4. It is not disputed that the Notices to File were received by Mr Pearson or that the
15 returns have not been filed.

5. On 6 June 2017, a late filing penalty of £100 was imposed under paragraph 3 of
Schedule 55 for each of the two tax years. On 3 October 2017, a 30 day daily penalty
reminder letter was issued for each of the two tax years to Mr Pearson.

6. On 31 October 2017, 60 day penalty reminder letters were issued.

7. On 10 November 2017, RMT Accountants & Business Advisors Ltd ("the agent")
20 telephoned HMRC stating that Mr Pearson had not received any income during those
two years. The agent was advised to complete the returns and appeal the penalties.

8. On 5 December 2017, daily penalties were issued to the appellant amounting to
25 £900 imposed under paragraph 4 of Schedule 55 and 6 months late filing penalties of
£300 for each year imposed under paragraph 5 of Schedule 55.

9. The penalties were appealed on 7 December 2017. On 13 November 2017 the
agent had written to HMRC appealing the late filing penalties on the basis that:
Mr Pearson had registered for self-assessment to file a tax return for 2015/16 (and he
has done so as that was the first year in which he received income from the company);
30 and he did not meet the criteria to submit a self-assessment tax return in respect of the
earlier years as he had not received any income.

10. On 8 December 2017, HMRC responded pointing out that where a Notice to File
was issued, then whether or not a taxpayer received income, there is a responsibility
to file the return.

11. The agent responded on 13 December 2017 referring to Section 7 Taxes
35 Management Act 1970 ("TMA") stating that a director who has no taxable income is

not required to report to HMRC or to register for self-assessment. The agent relied on *Kadhem v HMRC*¹ (“Kadhem”) and requested a review.

5 12. On 24 January 2018, HMRC responded upholding the penalties and pointing out that in terms of Section 8 TMA, Mr Pearson had been required to deliver tax returns for the two years and he had not done so.

13. On 23 February 2018, Mr Pearson appealed to the Tribunal stating that he did not have an income in those years and there were hundreds of other cases where no penalties had been imposed.

10 14. In the interim the agent submitted a letter of complaint to HMRC pointing out that they had requested that HMRC cancel tax returns and penalties for other clients in identical circumstances and HMRC had done so. They referred to and relied on HMRC’s Self-Assessment Manual SAM120115 which states:

15 “However, for tax years 2012-2013, and later, an individual, partnership or trustee can request that we withdraw a notice to file and, if the customer no longer satisfies SA criteria for that year, we can agree to withdraw the notice, unless the customer is RLS, and cancel any penalties for failing to file the return, under Schedule 55 FA 2009. An agent can also request, on the customer’s behalf, that the notice is withdrawn and we will accept the request as long as the customer has authorised the agent to act on their behalf”.

Discussion

20 15. As the Upper Tribunal indicated at paragraph 36 in *HMRC v Hok Ltd*²:

“It is important to bear in mind how the First-tier Tribunal came into being. It was created by S3(1) of the Tribunals, Courts and Enforcement Act 2007, ‘for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act’. It follows that its jurisdiction is derived wholly from statute”.

25 Therefore this Tribunal does not have a discretion but must simply apply the law.

16. By contrast, HMRC have considerable discretion which is loosely described as being its “care and management” function. In *CIR v Nuttall*³ Bingham LJ accepted that if in an appropriate case:

30 “... the Revenue reasonably considers that the public interest in collecting taxes will be better served by informal compromise with the taxpayer than by exercising the full rigour of its coercive powers, such compromise seems to me to fall within the wide managerial discretion of the body to whose care and management the collection of tax is committed”.

That applies to penalties just as it applies to tax.

¹ 2017 UKFTT 466 (TC)

² 2012 UKUT 363 (TCC)

³ 1992 64 TC 548

17. The Tribunal make this distinction since HMRC's manual is simply their internal guidance and it relates to its care and management powers. This Tribunal can only look at the relevant legislation.

5 18. In this instance Mr Pearson intimated to HMRC that he had been a Director since 2013. HMRC then issued tax returns in terms of Section 8 TMA.

19. The agent had argued that the requirement to register for Self-Assessment under Section 7 TMA does not make a statutory obligation for a company director to register as a self-employed person. HMRC have rightly agreed that point but Section 7 TMA is of no relevance in this appeal.

10 20. The issue is that if a taxpayer is served with a Notice to File in terms of Section 8 TMA then there is a legal obligation to make the return by the date specified in that Notice. Section 8 reads:-

15 "8(1) For the purpose of establishing the amounts in which a person is chargeable to income VAT ... for a year of assessment – he may be required by Notice given to him by an officer of the Board—

(a) To make and deliver to the officer ... a return containing such information as may reasonably be required in pursuance of the Notice."

20 21. Section 8B TMA applies to a person who is given a Notice under Section 8. That provides that HMRC can withdraw the Notice to File before the end of the withdrawal period. That is defined as follows:-

"8B(6) For the purpose of subsection (2) 'the withdrawal period' means—

(a) The period of two years beginning with the end of the year of assessment to which the Notice under Section 8 or 8A relates, or

(b) In exceptional circumstances, such as extend the period as HMRC may determine".

25 22. In this instance the request for the Notices to be withdrawn was lodged with HMRC by the agent on 13 November 2017 but the withdrawal period for the later of the two tax returns ended on 5 April 2017. Therefore no withdrawal under Section 8B(6)(a) could be made.

23. The only other possibility would be a withdrawal under Section 8(6)(b).

30 24. HMRC argue that there is nothing exceptional in this case. The Notices to File were issued and nothing happened until the penalties were issued. The Notices to File gave a clear date for the returns to be filed and the appellant chose not to make those returns based on what HMRC describe as "flawed reasoning".

35 25. The Tribunal agrees with HMRC. The request for withdrawal was too little and too late and the agent's reasoning was indeed flawed.

26. In summary, HMRC have correctly issued Notices to File in terms of Section 8 TMA. The agent did not request withdrawal of those Notices timeously.

Mr Pearson, accepted the agent's incorrect advice not to file tax returns indicating that he had no income.

Reasonable excuse

27. There is no doubt that the returns are late and that gives rise to the penalties.
5 Paragraph 23 of Schedule 55 provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, the Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

28. Reasonable excuse is not defined in the legislation. Not every excuse is a
10 reasonable excuse. The Tribunal agrees with Judge Berner in *Barrett v HMRC*⁴ at paragraph 154 where he said:

15 “The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard”.

29. The only explanation for the failure to file returns in this case is that the agent repeatedly advised the appellant that there was no need to do so. The agent was
20 wrong. Where a return is issued under Section 8 TMA then the taxpayer must file it unless a withdrawal is timeously requested.

30. Secondly, perhaps, at best, the agent did get muddled about what the appellant should have done, but the question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*⁵ where Judge Hellier said in the context of reasonable excuse for VAT default
25 surcharges at paragraph 12:

“What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. ...”.

The Tribunal agrees.

30 31. The agent relied on *Kadhem*. That case was decided on its own merits and turned on whether or not HMRC had sent a Notice to File a self-assessment tax return to the appellant. That is not the case here. In this case, there is no doubt that the Notices to File were issued to Mr Pearson. In *Kadhem* the Tribunal made it explicit at
paragraph 26 that:

35 “The Tribunal accepts that if a person receives a Notice to File a return he is under an obligation to file a return by the due date ...”.

⁴2015 UKFTT 329 (TC)

⁵ 2012 UKFTT 315 (TC)

32. The only other possible argument on reasonable excuse, which obviously was not advanced by the agent, was that Mr Pearson relied on the agent who failed him. Paragraph 23(2)(b) of Schedule 55 states that:

5 “Where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure”.

33. Mr Pearson was a wholly credible and straightforward witness. He is no longer represented by the agent. The agent had offered to represent him at the Tribunal but the proposed fees were far too expensive for Mr Pearson.

34. He explained that whilst he was a full-time student he set up a company and the University recommended the agent. The agent provided proactive advice in relation to the business, the accounts and the returns etc that were required for both the business and the directors.

35. Pertinently, although it was Mr Pearson who telephoned HMRC to say that he was a director of the company, as soon as he received the tax returns, he sent them to the agent requesting advice as to what he should do. He was told that there was no need to file the returns for the earlier years. As soon as he received the penalty and the penalty reminders he contacted the agent who reiterated the advice and explained, incorrectly, that he had no requirement to file the returns. Every time he received anything from HMRC he referred it to the agent. At all times he had believed what he was told by the agent.

36. At paragraph 29 we refer to Judge Berner in *Barrett*. At paragraphs 160 and 161 he went on to say:-

25 “160. I do not agree that Mr Barrett’s actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of Mr Aspros, and in providing all relevant documentation to Mr Aspros, were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros’ capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros’ acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC’s published guidance, himself.

35 161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual’s conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.”

37. In this instance, Mr Pearson was a young man with understandably limited experience of tax. In our view, he was certainly entitled to believe that, if the University had recommended the agent, and the agent held itself out as being

experienced and competent, as it did, then he could rely on the advice given. It was not unreasonable for him to have assumed that the advice that he had been given was accurate. Regrettably it was most certainly bad advice and Mr Pearson has suffered a great deal of stress as a result not least because the penalties were beyond his means.

5 38. Accordingly, in the particular circumstances of this case the Tribunal finds that Mr Pearson had a reasonable excuse for the non-filing of these two returns.

39. There is one final matter that was raised at the end of the hearing. Since the appeal was intimated it appears that HMRC had imposed a further 12 month late filing penalty for 2014/15. The process is automated so, although there is no record of a
10 similar penalty having been imposed for 2013/14, it may well be that it exists.

40. We are obliged to Mr Butler for readily agreeing that the Tribunal, having due regard to Rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, should admit late appeals for both those penalties and include them in this decision.

15 41. For all these reasons, we allow the appeals and cancel all of the penalties for late filing in 2013/14 and 2014/15.

42. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later
20 than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 28 JUNE 2018

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